Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1924 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, PETTITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

25pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members (who represent management in grievance adjustment or collective bargaining) for working for an employer that does not have a collective bargaining agreement with that union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
Summary of argument	7
Argument:	
The Board reasonably concluded that a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members, who represent management in grievance adjustment or collective bargaining, for working for an employer that does not have a collective bargaining agreement with that union	8
A. Section 8(b)(1)(B) prohibits union discipline of supervisor-members that may adversely affect their willingness to serve as grievance adjusters or collective bargainers on behalf of an employer	8
B. The view of the court below that union discipline of a supervisor-member violates Section 8(b)(1)(B) only when the union represents or demonstrates a specific intent to represent the affected employer's employees is inconsistent with this Court's decision in *ABC* and is an unwarranted limitation on the protection Congress afforded to employers	13
C. The Board's decision is a reasonable construction of the statutory language and is entitled to deference	19
Conclusion	21

TABLE OF AUTHORITIES

Cases:

American Broadcasting Cos. v. *Writers Guild*, 437 U.S. 411	*passim*
Florida Power & Light Co. v. *IBEW, Local 641*, 417 U.S. 790	7, 9, 11, 12, 18, 21
IBEW, Local 134 v. *NLRB*, 487 F.2d 1143, cert. denied, 418 U.S. 1143	13
IBEW, Local 340 (Hulse Electric) v. *NLRB*, 273 N.L.R.B. 428	5

Cases—Continued: Page

International Organization of Masters, 197 N.L.R.B. 400, enforced, 486 F.2d 1271, cert. denied, 416 U.S. 956 ... 17
International Organization of Masters v. *NLRB*, 539 F.2d 554, cert. denied, 434 U.S. 828 ... 17
New Mexico District Council of Carpenters (A.S. Horner, Inc.), 177 N.L.R.B. 500, enforced, 454 F.2d 1116 ... 12-13, 16, 17, 18
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 ... 20
NLRB v. *IBEW, Local 73 (Chewelah Contractors, Inc.)*, 714 F.2d 870 ... 4, 5, 6, 7, 14, 15, 18, 19
NLRB v. *IBEW, Local Union No. 323*, 703 F.2d 501, cert. denied, 464 U.S. 950 ... 14, 18
NLRB v. *Iron Workers, Local Union No. 103*, 434 U.S. 335 ... 19, 20
Packard Motor Car Co. v. *NLRB*, 330 U.S. 485 ... 8-9, 15
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 ... 20
Plumbers Local 364, 254 N.L.R.B. 1123 ... 4
Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 ... 20
San Francisco-Oakland Mailers Union No. 18 (Northwest Publications, Inc.), 172 N.L.R.B. 2173 ... 10, 11
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 ... 21

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(3), 29 U.S.C. 152(3) ... 9
§ 2(11), 29 U.S.C. 152(11) ... 9
§ 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B) ... *passim*
§ 8(b)(3), 29 U.S.C. 158(b)(3) ... 15
§ 10(e), 29 U.S.C. 160(e) ... 21
§ 14(a), 29 U.S.C. 164(a) ... 9

Wagner Act, ch. 372, § 2(3), 49 Stat. 449 ... 9

Miscellaneous:

93 Cong. Rec. (1947):
p. 3836 ... 9
p. 3837 ... 10
p. 4143 ... 10
p. 5014 ... 9

S. Rep. 105, 80th Cong., 1st Sess. Pt. 1 (1947) ... 9

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1924

NATIONAL LABOR RELATIONS BOARD, PETTITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 780 F.2d 1489. The decision and order of the National Labor Relations Board (Pet. App. 9a-37a) are reported at 271 N.L.R.B. 995.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a) was entered on January 22, 1986. On April 16, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 22, 1986. The petition was filed on May 22, 1986, and granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), provides:

> It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]

STATEMENT

1. Harold E. Nutter, Inc. (Nutter) and Royal Electric Co. (Royal) are electrical contractors in Sacramento, California. They were represented in collective bargaining by the Sacramento Valley Chapter of the National Electrical Contractors Association, Inc. (NECA), a multiemployer bargaining group. Prior to 1981, NECA had negotiated a series of collective agreements with respondent International Brotherhood of Electrical Workers, Local 340 (the Union). The last of those agreements expired on May 31, 1981, and, when negotiations for a new contract were unsuccessful, the Union struck all NECA members, including Nutter and Royal. Pet. App. 2a, 11a, 12a; J.A. 55-56, 61-62, 64.

The strike lasted for several months. On September 15, 1981, the Union sent NECA a disclaimer of interest in representing the employees of NECA members in "the multi-[employer] bargaining unit previously established," and NECA accepted the disclaimer (Pet. App. 2a, 12a-13a). The Union then filed separate representation petitions seeking to represent, in single-employer units, employees of 17 NECA members. The Union did not file petitions for representation of the employees of either Nutter or Royal. On October 1, 1981, NECA signed a bargaining agreement with a different union, the National Association of Independent Unions (NAIU), and both Nutter and Royal adopted the NAIU agreement. *Id.* at 2a, 13a; J.A. 56, 77-78, 125-127.

During 1982, Ted Choate, a Union member, served as vice-president and estimator for Nutter. Choate's duties included hiring employees from the NAIU hiring hall,

transferring employees from jobsite to jobsite, visiting jobsites, and supervising foremen. One supervisor with specific responsibility to adjust employee grievances reported directly to Choate in the company's management hierarchy. Pet. App. 21a; J.A. 74-75, 83-84, 95-96, 103, 108. Albert Schoux, another Union member, was Royal's superintendent at its Aerojet jobsite. His duties included planning and ordering materials for the job; hiring employees from the NAIU hiring hall; and assigning, transferring and firing employees. Schoux handled and resolved employees' job-related requests and personal problems, such as requests for time off and complaints about particular work assignments. Pet. App. 14a-16a; J.A. 7, 9-10, 14-18, 25, 42-43, 47, 53-55.

In the fall of 1982, internal Union charges were filed against both Choate and Schoux, alleging that they had violated the Union's constitution by working for employers who did not have a collective bargaining agreement with the Union. Choate and Schoux were each found guilty as charged by a separate Union trial board. Choate was fined $6,000 and Schoux was fined a total of $8,200. Pet. App. 3a, 18a, 21a-22a; J.A. 127-128, 137-150, 152.

2. The National Labor Relations Board, adopting the findings and conclusions of the administrative law judge, concluded that the Union violated Section 8(b)(1)(B) of the National Labor Relations Act (the Act), 29 U.S.C. 158(b)(1)(B), by fining Choate and Schoux. The Board found that Choate and Schoux were supervisors who acted as grievance adjustment or collective bargaining representatives for their employers and that, by fining them because they worked for nonsignatory employers, the Union had restrained and coerced Nutter and Royal in the selection and retention of their representatives for those purposes. Pet. App. 28a, 34a. The Board explained that " 'the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease

working' " for the non-signatory employer, " 'thereby depriving the employer of the grievance adjustment services of his chosen representative' " (Pet. App. 27a, quoting *Plumbers Local 364,* 254 N.L.R.B. 1123, 1125 (1981)).

The Board rejected the Union's contention, which was based on the Ninth Circuit's decision in *NLRB* v. *IBEW, Local 73 (Chewelah Contractors, Inc.)*, 714 F.2d 870 (1980) (*Chewelah*), that Section 8(b)(1)(B) could not have been violated because the Union did not have or intend to establish a collective bargaining relationship with Nutter or Royal at the time it fined Choate and Schoux. The Board held that *Chewelah* was inconsistent with this Court's decision in *American Broadcasting Cos.* v. *Writers Guild,* 437 U.S. 411 (1978) (*ABC*). The Board explained that, in *ABC,* this Court found that discipline imposed on grievance-handling supervisors who crossed union picket lines violated Section 8(b)(1)(B) even though the supervisors did not supervise or adjust grievances of the striking employees, but only supervised or adjusted grievances of employees whom the striking union did not represent or desire to represent. The Board stated that, although the union in *ABC* did represent other employees of the complaining employer, and thus did have a bargaining relationship with the employer, the Court had made clear in *ABC* that its rationale applied equally to situations in which the union did not represent any employees of the complaining employer. Pet. App. 30a-31a (citing *Plumbers Local 364,* 254 N.L.R.B. at 1126-1127).

The Board also concluded that, even under the Ninth Circuit's *Chewelah* decision, the Union violated Section 8(b)(1)(B) because in fact one of the purposes of the fines was to pressure Nutter and Royal ultimately to sign collective bargaining agreements with the Union. The Board found that the fines were intended to "force the employers out of the NECA multiemployer bargaining and into

bargaining on a single employer * * * or new association basis," and it noted that "[a] union's attempt to force an employer to resign from a multiemployer bargaining association was recognized as an 8(b)(1)(B) violation by the Court in *Chewelah*" (Pet. App. 33a-34a).[1]

The Board ordered the Union, *inter alia,* to rescind the fines levied against Choate and Schoux, to expunge from its records the disciplinary action taken against them, and to post appropriate notices (Pet. App. 35a-36a).

3. The court of appeals denied enforcement of the Board's order. The court upheld the Board's findings that Choate and Schoux were supervisors and representatives of their employers for the purpose of grievance adjustment or collective bargaining (Pet. App. 4a-5a), and the court recognized that "[f]ines imposed on representatives may constitute prohibited coercion because the effect of the discipline may be to deprive an employer of the ser-

---

[1] In another case arising out of the same labor dispute between the Union and members of NECA—*IBEW, Local 340 (Hulse Electric)*, 273 N.L.R.B. 428 (1984)—the Board found that the Union had violated Section 8(b)(1)(B) by fining supervisors working for six other nonsignatory NECA employers, even though the Union had disclaimed interest in dealing with those employers in the multiemployer bargaining unit. In *Hulse,* the Union had filed individual representation petitions with respect to two of the employers but, as with Nutter and Royal in this case, it made no immediate efforts to organize or bargain with the other four employers. As here, the Board in *Hulse* found the absence of a union representation petition to be irrelevant to the violation; whether or not the Union filed such a petition, the effect of the Union's discipline was to deprive the employer of the services of its chosen representatives. The Board also found, as it did here, that the discipline was unlawful even under the Ninth Circuit's *Chewelah* standard because the evidence showed that, even if the Union had not filed a representation petition against a particular employer, the Union intended to withhold supervisors from NECA employers in order to force the employers to "come back to [the Union]" on "a single employer basis." 273 N.L.R.B. at 442.

vices of his representative" (*ibid.*). The court ruled, however, that its prior decision in "*Chewelah* controls and is dispositive of the issue in this case" (*id.* at 6a).

In *Chewelah,* the Ninth Circuit had ruled that even though a union fined a member-supervisor with grievance-handling responsiblitity for working for a nonunion employer (Chewelah), there was no Section 8(b)(1)(B) violation because the union neither represented nor sought to represent Chewelah's employees and therefore "had no incentive to either influence Chewelah's choice of bargaining representative or affect [the disciplined supervisor's] loyalty to Chewelah." 714 F.2d at 871. Applying these principles to this case, the court held that "when a union does not represent or intend to represent the complaining company's employees there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives" (Pet. App. 5a).

The court also rejected the Board's contention that there was a violation even under *Chewelah* because the Union in this case had in fact demonstrated an interest in representing Nutter's and Royal's employees. The court held that "where a Union has filed a disclaimer of interest, and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer" (Pet. App. 7a). The court added that, in order to establish a violation of Section 8(b)(1)(B), it would require more than "a generalized desire to bargain" and would "require some evidence of specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out * * * cards to find a desire to represent * * * particular employees" (Pet. App. 7a).

SUMMARY OF ARGUMENT

1. Section 8(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to "restrain or coerce" an employer in selecting collective bargaining or grievance adjustment representatives. The section was enacted in 1947 as part of the Taft-Hartley package of amendments; its purpose was to assure employers that there would be no coercion by unions in the selection of their collective bargaining and grievance adjustment representatives. Both the statutory language and the legislative history show that Section 8(b)(1)(B) is concerned with the effect or potential effect on the employer. Accordingly, the decisions of the Board and this Court have recognized that the test for a violation of Section 8(b)(1)(B) is whether union conduct (in this case the discipline of a supervisor-member) "may adversely affect" the member's performance of grievance adjustment or collective bargaining tasks on behalf of his employer. *Florida Power & Light Co.* v. *IBEW, Local 641,* 417 U.S. 790, 804-805 (1974); *ABC,* 437 U.S. at 425.

2. The Ninth Circuit improperly focused on the union's motivation rather than on the impact on the employer. It acknowledged that the fines imposed on grievance handling or collective bargaining representatives "may constitute prohibited coercion because the effect * * * may be to deprive an employer of the services of his representative" (Pet. App. 4a, 5a). Under this Court's decisions, the determination that such an effect may occur should be the end of the matter. But the Ninth Circuit ruled that union action having such an effect does not violate Section 8(b)(1)(B) when the "union does not represent or intend to represent the complaining company's employees" (Pet. App. 5a, citing *Chewelah,* 714 F.2d at 871). By engrafting onto the statute a requirement that does not appear in its language, the court below has deprived employers of part

of the freedom that Congress intended to assure them to select representatives for grievance adjustment or collective bargaining free of union coercion or restraint.

3. If the language and legislative history of the statute left any doubt about whether the impact on the employer, rather than the union's motivation, is dispositive, the court below should have deferred to the reasonable construction placed on the statute by the Board, the agency charged with administering and enforcing the Act.

ARGUMENT

THE BOARD REASONABLY CONCLUDED THAT A UNION VIOLATES SECTION 8(b)(1)(B) OF THE NATIONAL LABOR RELATIONS ACT BY DISCIPLINING SUPERVISOR-MEMBERS, WHO REPRESENT MANAGEMENT IN GRIEVANCE ADJUSTMENT OR COLLECTIVE BARGAINING, FOR WORKING FOR AN EMPLOYER THAT DOES NOT HAVE A COLLECTIVE BARGAINING AGREEMENT WITH THE UNION

A. Section 8(b)(1)(B) Prohibits Union Discipline Of Supervisor-Members That May Adversely Affect Their Willingness To Serve As Grievance Adjusters Or Collective Bargainers On Behalf Of An Employer

1. Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), makes it "an unfair labor practice for a labor organization * * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The evident purpose of the statute is to free employers from restraint or coercion by unions in the choice of representatives for collective bargaining or grievance adjustment.

Section 8(b)(1)(B) was one of several provisions added to the Act in 1947 to clarify the relationship between employers and supervisory employees in the wake of this Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330

U.S. 485 (1947).[2] In addition to Section 8(b)(1)(B), Congress enacted Section 2(3), 29 U.S.C. 152(3), which excludes supervisors (as defined in Section 2(11), 29 U.S.C. 152(11)) from the definition of "employee," thereby denying to supervisors the protections of the Act. Congress also enacted Section 14(a), 29 U.S.C. 164(a), which provides that, while supervisors are not prohibited from becoming or remaining union members, employers are not required to treat them as employees for purposes of collective bargaining. The dissenters in *Packard* had viewed foremen as constituting "the arms and legs of management in executing labor policies" (330 U.S. at 496), and those in Congress who favored passage of the 1947 amendments believed, in the words of Senator Taft, that "[f]oremen are part of management" (93 Cong. Rec. 3836 (1947)). See also 93 Cong. Rec. 5014 (1947)(remarks of Senator Ball). Because foremen—and supervisors generally—play a key role in the dealings between management and rank-and-file, it is essential, the Senate Report stated, that employers be assured of the "undivided loyalty" of their supervisors. S. Rep. 105, 80th Cong. 1st Sess. Pt. 1, at 5 (1947).

In addition to that effort to protect employers against the effects of such conflicting loyalties, Congress enacted the specific protection embodied in Section 8(b)(1)(B): that employers be free of "union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment" (*Florida Power,* 417 U.S. at 803). See S. Rep. 105, *supra,* at 21 (the statute was intended to prohibit unions from compelling "the removal of a * * * supervisor who has been delegated the function

---

[2] In *Packard,* the Court upheld a Board determination that certain foremen were "employees" under the Wagner Act, ch. 372, § 2(3), 49 Stat. 449, and constituted an appropriate unit for collective bargaining purposes.

of settling grievances"); 93 Cong. Rec. 3837 (1947) (remarks of Senator Taft) ("Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with' "); *ibid.* (remarks of Senator Taft) ("employees cannot say to their employer. 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones and therefore you will have to fire him, or we will not go to work"); 93 Cong. Rec. 4143 (1947) (remarks of Senator Ellender) ("The bill * * * makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. * * * [Q]uite a few unions forced employers to change foremen. * * * This amendment seeks to prescribe a remedy in order to prevent such interferences").

2. Consistent with the language and purpose of Section 8(b)(1)(B), the Board has focused, in interpreting the section, on the potential impact of union conduct on employers.[3] This Court has approved that approach, en-

---

[3] The Board initially construed Section 8(b)(1)(B) to prohibit only direct union pressure designed to compel an employer to replace its chosen representative. In *San Francisco-Oakland Mailers Union No. 18 (Northwest Publications, Inc.)*, 172 N.L.R.B. 2173 (1968), the Board construed the statute also to prohibit union fines directed against supervisor-members for the manner in which they assigned work under an existing collective bargaining agreement between the union and the employer. The Board found in *Oakland Mailers* that, although the union "sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the [employer] by in-

dorsing the Board's view that Section 8(b)(1)(B) prohibits not only a union's direct economic pressure on an employer to replace its chosen collective bargaining or grievance adjustment representative, but also "a union's discipline of one of its members who is a supervisory employee * * * when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." *Florida Power,* 417 U.S. at 804-805; *ABC,* 437 U.S. at 424.

In *ABC,* as in this case, the union membership included persons employed in supervisory positions. The supervisor-members (referred to by the Court as "hyphenates") performed duties involving collective bargaining or grievance adjustment on behalf of the employer. The Court held that the union violated Section 8(b)(1)(B) by imposing fines on the hyphenates for performing their regular supervisory duties during a strike. In so holding, the Court agreed with the Board that "as to those hyphenates whom the union kept from work, the employer was restrained and coerced within the meaning of § 8(b)(1)(B) by being totally deprived of the opportunity to choose these particular supervisors as his collective-bargaining or grievance-adjustment representatives during the strike"; and as to those hyphenates who reported for work and were disciplined for performing only their normal supervisory functions, it was probable that the union discipline would diminish their capacity "to carry out their

---

direct rather than direct means," the pressure ultimately interfered with the employer's control over its representatives. "Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." *Oakland Mailers,* 172 N.L.R.B. at 2173. See *Florida Power,* 417 U.S. at 798-800; *ABC,* 437 U.S. at 422-423.

grievance-adjustment duties effectively" in the future and thus the employer would be forced to replace them (437 U.S. at 432, 434-435).[4]

In sum, *ABC* makes clear that "[u]nion pressure on supervisors can affect either their willingness to serve as grievance adjustors or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative" (437 U.S. at 436).

3. In the present case it is undisputed, and the court below found, that Choate and Schoux were authorized to perform grievance adjustment and collective bargaining tasks in the course of their supervisory duties (see pages 2-3, 5 *supra*). It is also beyond dispute that the Union fined the supervisors in order to induce them to cease working for employers with which the Union did not have a contract.[5] In these circumstances, the union discipline would be likely to affect the supervisors' "willingness to serve as grievance adjustors or collective bargainers" (*ABC*, 437 U.S. at 436) for employers disfavored by the Union. The situation is virtually identical to that in *New Mexico District Council of Carpenters (A.S. Horner, Inc.)*, 177

---

[4] The Court distinguished *ABC* from the facts in *Florida Power*, where the union had disciplined supervisor-members who performed only rank-and-file work during a strike. Unlike this case and *ABC*, where the supervisor-members performed their normal supervisory functions, *Florida Power* involved union discipline that merely deprived the employer of services normally rendered by replacement employees and would not tend adversely to affect the supervisor's ability or willingness to perform Section 8(b)(1)(B) functions. 437 U.S. at 429-430, 434-435 n.34.

[5] Although one of the Union's defenses at the hearing before the administrative law judge was that the discipline was directed at the performance of rank-and-file work, the ALJ's decision, as well as the decisions of the Board and the court of appeals, recognized that the Union fines were imposed because the supervisor-members worked for firms that had no contract with the Union (Pet. App. 3a, 14a).

N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972), in which the union fined a supervisor-member with grievance handling functions because he worked for an employer that did not have a contract with the union. The Board found in *A.S. Horner* that the union was effectively "using its internal working rules to boycott an employer" who had no contract with it (177 N.L.R.B. at 502). In *ABC,* this Court cited that aspect of *A.S. Horner* with approval, stating that "[a] fine imposed in these circumstances violated the section [8(b)(1)(B)] because compliance by the supervisor with the union's demands would have required his leaving his job and thus have 'the effect of depriving the Company of the services of its selected representative for the purpose of collective-bargaining or the adjustment of grievances.' " 437 U.S. at 436 n.36 (quoting *A.S. Horner,* 177 N.L.R.B. at 502). Indeed, this Court noted that the prohibition of union discipline in *A.S. Horner* fell " 'close to the original rationale of Section 8(b)(1)(B)[,] which was to permit the employer to keep the bargaining representative of his own choosing.' " *ABC,* 437 U.S. at 436 n.36 (quoting *IBEW, Local 134* v. *NLRB,* 487 F.2d 1143, 1155 n.19 (D.C. Cir.), cert. denied, 418 U.S. 1143 (1973)); see also pages 9-10 & note 3, *supra.*

B. The View Of The Court Below That Union Discipline Of A Supervisor-Member Violates Section 8(b)(1)(B) Only When The Union Represents Or Demonstrates A Specific Intent To Represent The Affected Employer's Employees Is Inconsistent With This Court's Decision In *ABC* And Is An Unwarranted Limitation On The Protection Congress Afforded To Employers

The court of appeals acknowledged that the effect of respondent's discipline in this case "may be to deprive an employer of the services of his representative" (Pet. App. 5a). Under this Court's decision in *ABC* that conclusion

should have ended the case.[6] Instead, as it had in *Chewelah,* the court below focused on the union's asserted motive for disciplining the union member, rather than on the effects of the discipline on the union member's employer. In *Chewelah,* the court had held that union discipline of a supervisor-member for working for a nonunion employer did not violate Section 8(b)(1)(B) because the union had "no incentive to either influence [the employer's] choice of bargaining representatives or affect [the employee's] loyalty to his employer."[7] 714 F.2d at 871. In the present case, the court continued further along the same path. It first stated that, "[t]he central question is whether the union demonstrated an intent to represent the employees of the nonsignatory employers" (Pet. App. 6a). It then rejected the Board's finding that the Union did have a representational interest, stating (Pet. App. 7a) that a "generalized desire to bargain" would not suffice; instead, it placed on the Board the burden of proving a clear interest in representing "particular employees," evidenced

---

[6] The Eleventh Circuit so recognized in *NLRB* v. *IBEW Local Union No. 323,* 703 F.2d 501, cert. denied, 464 U.S. 950 (1983), in upholding the Board's finding that a union violated Section 8(b)(1)(B) by fining a supervisor-member with grievance-handling responsibilities because he worked for a nonunion employer. The court stated that since the supervisor "was fined for his affiliation with a nonunion company, 'compliance * * * with the union's demands would have the effect of depriving the Company of the services of its selected representative' " in violation of the Act. 703 F.2d at 505 (quoting *ABC,* 437 U.S. at 436 n.36).

[7] The emphasis on the union's representational intent was underscored when, on the Board's petition for rehearing, the court in *Chewelah* amended its opinion to add that "[t]he case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection." 714 F.2d at 871-872.

by "specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out * * * cards" (*ibid.*).[8]

The approach taken by the court below would engraft onto the statute a limitation not intended by Congress. As the language of the statute shows, where Congress sought to limit the scope of the legislation it did so expressly. For example, Section 8(b)(3), 29 U.S.C. 158(b)(3), makes it an unfair labor practice for a union to refuse to bargain collectively with an employer "provided it is the representative of [the employer's] employees." Congress was thus fully capable of inserting such provisos or limitations where it wished to do so. The provision at issue in this case has no such restriction: the congressional solution to the bargaining-representative/grievance-adjuster problem in the wake of *Packard* was to protect management's choice of such personnel from *union* coercion generally, not merely from interference by unions with whom the employer currently has a relationship.

Lacking any support in the words of the statute, the decision below apparently rests on the premise that the concerns underlying Section 8(b)(1)(B) relate to "the integrity of the collective-bargaining process" and that those concerns are implicated only " 'when the union charged with influencing an employer's choice of bargaining representatives is the bargaining representative of that employer's employees' " (Br. in Opp. 3, quoting *Chewelah*, 621 F.2d at 1036). But neither the language nor the legislative history of Section 8(b)(1)(B) (see pages 8-10, *supra*) supports the view that Congress intended to protect an employer only from coercion by a union that has or seeks to have a collective bargaining relationship with the

[8] Respondent recasts this standard (Br. in Opp. 2) to say that Section 8(b)(1)(B) proscribes union discipline of supervisor-members with grievance-handling or collective-bargaining responsibilities only if the union "is engaged with the employer in the collective bargaining process."

employer. Rather, as *ABC* teaches, Section 8(b)(1)(B) may be violated by any union sanctions on supervisors that "may adversely affect" either a supervisor's actual performance of collective bargaining or grievance adjustment tasks, or his willingness to serve in that capacity (437 U.S. at 430, 436). The unlawful effect is no less clear where the union seeks to prevent a supervisor-member from working for an employer with which the union has no relationship than it is where the union seeks to affect the supervisor-member's actual performance of collective bargaining or grievance adjustment tasks. In the former case, "compliance by the supervisor with the union's demands would have required his leaving his job," thereby directly depriving the employer of his chosen representative (*ABC*, 437 U.S. at 436 n.36, citing *A.S. Horner, supra*); in the latter case, such compliance requires the employer, in order "to insure having satisfactory collective-bargaining and grievance-adjustment services," to make "a change in his representative" (*ABC*, 437 U.S. at 435).

In *ABC* itself, this Court rejected any requirement that the union show a specific intent to represent particular employees or to affect the performance of a supervisor's grievance adjustment or collective bargaining duties with respect to the employees who are represented by the offending union. There, the union (which represented writers in the film industry) disciplined directors, as well as other supervisor-members, for working during a writers' strike. The directors neither supervised writers nor adjusted their grievances, and the union had no interest in representing those employees whom directors did supervise and who were represented by a separate union. As does respondent here (Br. in Opp. 2), the union in *ABC* contended that the lack of such a representational nexus exempted its disciplinary action from Section 8(b)(1)(B). The Court, however, noting that the union's discipline would make the supervisor-members less willing to continue

serving their employer in that capacity, concluded that a "union may no more interfere with the employer's choice of grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." *ABC*, 437 U.S. at 437-438 n.37.[9]

In this case the employers had a bargaining relationship with a union other than respondent (page 2, *supra*), and the effect of respondent's discipline was to coerce the employers in the selection of their representatives in that relationship. But that does not make the coercion any less a violation of Section 8(b)(1)(B); indeed, in *A.S. Horner, supra,* which was cited with approval by this Court in *ABC*, the Board found that even if the employer did not have a collective bargaining relationship with any union, a union would violate Section 8(b)(1)(B) if its discipline of a supervisor-member with grievance-adjustment responsibilities had the effect of depriving the employer of his services.[10] The purpose of Section 8(b)(1)(B) is not solely to prohibit a union from coercing employers in selecting personnel to deal with that union and the employees it represents, but to prohibit unions from coercing an employer with respect to the selection of its labor relations personnel generally.

---

[9] The Court cited *International Organization of Masters*, 197 N.L.R.B. 400 (1972), enforced, 486 F.2d 1271, 1274 (D.C. Cir. 1973), cert. denied, 416 U.S. 956 (1974); and *International Organization of Masters* v. *NLRB*, 539 F.2d 554, 559-560 (5th Cir. 1976), cert. denied, 434 U.S. 828 (1978). In those cases the union was found to have violated Section 8(b)(1)(B) by picketing an employer to force it to replace grievance adjusters who were members of another union with adjusters who were members of the picketing union.

[10] Although, as respondent notes (Br. in Opp. 8 n.2), the union in *A.S. Horner* had lost a Board-conducted election several months earlier, the Board's rationale in that case, which was approved by the Tenth Circuit, did not turn on that fact but rather on the circumstance

As the Eleventh Circuit concluded in *NLRB* v. *IBEW Local Union No. 323,* 703 F.2d at 507: "Placing the emphasis on the effect caused by the union's actions, rather than its intent, is more consistent with the fundamental purpose of the statute." Congress' overriding concern in enacting Section 8(b)(1)(B) was to insulate an employer's *selection* of his collective bargaining or grievance adjustment representatives from union influence or interference. See *Florida Power,* 417 U.S. 803; see also pages 9-10, *supra.* An attempt to force a supervisor-member to cease working for a "nonunion" company demonstrably infringes on the employer's right to choose that person as its representative. "In view of that inevitable result, even a union endeavoring only to enforce an internal regulation, * * * can deprive the employer of the protection afforded by the statute." *NLRB* v. *IBEW Local Union No. 323,* 703 F.2d at 507. In short, whether the supervisor-member was fined for working for a "nonunion" employer (as here and in *A.S. Horner),* or for a struck employer (as in *ABC*), the employer has been deprived of its "unrestrained freedom to select a grievance-adjustment and collective bargaining representative." *ABC,* 437 U.S. at 430.[11]

The court below also erred in rejecting the Board's determination that the Union did, in fact, have a sufficient

---

that compliance by the supervisor with the union's demands would have had the effect of depriving the employer of the services of its selected representatives for the purposes of collective bargaining or the adjustment of grievances. See also *NLRB* v. *IBEW, Local Union No. 323,* 703 F.2d at 505.

[11] The Court's opinion in *ABC* also effectively disposes of the Ninth Circuit's comment in *Chewelah,* 714 F.2d at 871, that, because a supervisor-member may avoid discipline by resigning from the union, such discipline does not constitute restraint or coercion under Section 8(b)(1)(B). As this Court explained (*ABC,* 437 U.S. at 437), "this submission is simply another argument that union sanctions applied to supervisor-members * * * can never violate § 8(b)(1)(B)," a position that the Court rejected in both *Florida Power* and *ABC.*

representational interest to trigger the prohibitions of Section 8(b)(1)(B), even under the *Chewelah* standard. Although the Board, seeking to apply the *Chewelah* standard, found that the union was motivated by a desire to force NECA members out of the multiemployer unit and into single-employer bargaining units, the court rejected that finding. The indicia of union interest the court now states it will require (*e.g.*, picketing, handbilling, etc. (Pet. App. 7a)) would, in the Board's judgment, immunize coercion of decisions protected by Section 8(b)(1)(B) where such coercion occurs in the context of an ongoing struggle between an employer and the union which may not presently involve an effort to organize or to seek recognition as the employees' representative.[12] Even in the context of an organizing campaign, under the test utilized by the court below, a union that disciplined supervisor-members as the first step in such a campaign could do so with impunity (because it had not yet engaged in steps the court would regard as evidencing a representational interest).

C. The Board's Decision Is A Reasonable Construction Of The Statutory Language And Is Entitled To Deference

Interpretation of Section 8(b)(1)(B) calls for an exercise of the " 'difficult and delicate responsibility' " " 'of striking [the] balance to effectuate national labor policy * * *, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *ABC*, 437 U.S. at 431 (quoting *NLRB* v. *Iron Workers, Local Union No. 103*, 434 U.S. 335, 350 (1978)). In answering the question whether a union commits an unfair labor practice by disciplining its supervisor-members for working for a nonunion employer, the Board is engaged in its "special function of applying the general provisions of

---

[12] Indeed, the record in this case shows that even after Nutter signed the NAIU agreement, the Union engaged in informational picketing at one of Nutter's jobsites (J.A. 79, 85 133, 136).

the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945), and *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

The relationship between employers and supervisory employees who maintain union membership is a complex one that calls for discerning scrutiny in Section 8(b)(1)(B) cases. In craft unions, such as respondent, members may serve as supervisors on one jobsite and journeymen on another. Or, as in *ABC*, union members may serve their employers in several capacities simultaneously. Such employees may find it important, while performing supervisory grievance adjustment or collective bargaining functions on behalf of management, to maintain their union membership and to preserve the benefits and vested economic rights such membership may provide.

In this case, the Board examined the complexities of the particular facts and reasonably applied the principles set forth in *ABC*. The Board concluded that the union disciplinary actions restrained the employers in their choice of representatives for Section 8(b)(1)(B) purposes and thus violated that provision regardless of the union's motives or the nature of its relationship with the employers. That conclusion "represents an 'acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory section[].' " *ABC*, 437 U.S. at 430 (quoting *Iron Workers*, 434 U.S. at 341). By substituting its judgment for that of the Board, the court of appeals impermissibly intruded on the Board's primary responsibility in an area of the Board's expertise.[13]

---

[13] The court of appeals also erred in failing to accord greater deference to the Board's finding that the union did have "reasons to influence the employer's choice of bargaining representatives and to affect the supervisors' loyalty to their employers" (Pet. App. 33a). As the Board stated, the Union "intended to bargain with a new associa-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

NOVEMBER 1986

---

tion comprised of the[] 17 [NECA] employers [as to whom representation petitions had been filed]. Thereafter, [the Union] desired to have the other employers join the new association" (*ibid.*). See *id.* at 24a-25a. This finding, which is supported by substantial evidence, must be treated as conclusive. 29 U.S.C. 160(e); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

The Board's finding also serves to illustrate that this case falls clearly within the category of conduct Section 8(b)(1)(B) was intended to proscribe. As this Court stated in *Florida Power*, 417 U.S. at 803 (footnote omitted), "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units."

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40086